U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-Y-D-Y-F-

DATE: NOV. 20, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a church, seeks to employ the Beneficiary as a church music director. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director initially approved the petition, but upon further review, discovered inconsistencies regarding the Beneficiary's claimed employment experience and properly issued a notice of intent to revoke (NOIR) the petition's approval on May 10, 2017. After receiving the Petitioner's response to the NOIR, the Director issued a decision on July 19, 2017, stating that the petition would be denied because the Petitioner had not established the Beneficiary's eligibility. The Petitioner then filed a motion on the denial and the Director dismissed the Petitioner's motion on October 3, 2017, finding that it did not meet the motion requirements. The Petitioner next appealed the matter. However, rather than forwarding the appeal to our office, the Director issued a decision on December 7, 2017, which stated that the denial of July 19, 2017, was being reopened on a service motion and that after a complete review of the record, "it is decided that the petition should be revoked." On December 8, 2017, the Director issued another decision, this time finding that the Petitioner had not adequately explained evidentiary inconsistencies concerning the Beneficiary's employment history and invalidated the labor certification on that basis. Accordingly, the Director revoked the prior approval of the petition on the ground that it was not supported by a valid labor certification. The Petitioner then filed an appeal of the December 8, 2017, decision as well. Because the two pending appeals before us concern identical issues of law and fact, we will consolidate them to issue a single decision.[1]

Upon *de novo* review, we will withdraw the Director's prior decisions and remand the case for further consideration and the issuance of a new decision.

[1] The appeal filed on the October 3, 2017, decision was assigned receipt number The appeal filed on the December 8, 2017, decision was assigned receipt number For the purposes of consolidating the appeals, we will use as the receipt number for this decision and administratively close

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 205 of the Act 8 U.S.C. § 1155, provides that the Secretary of Homeland Security may "for good and sufficient cause, revoke the approval of any petition." By regulation this revocation authority is delegated to any USCIS officer who is authorized to approve an immigrant visa petition "when the necessity for the revocation comes to the attention of [USCIS]." 8 C.F.R. § 205.2(a). USCIS must give the petitioner notice of its intent to revoke the prior approval of the petition and the opportunity to submit evidence in opposition thereto, before proceeding with written notice of revocation. *See* 8 C.F.R. § 205.2(b) and (c).

II. ANALYSIS

The procedural history described above contains a number of procedural irregularities and errors on the part of the Director. First, the decision of July 19, 2017, was improperly issued as a denial rather than as a revocation. The record also demonstrates that the Director's decision of October 13, 2017, to dismiss the motion for not meeting motion requirements was incorrect, as the Petitioner's submission did in fact meet the requirements of a motion reopen. The Director's December 7, 2017, decision to reopen the matter on a service motion after the appeal was filed on the October 13, 2017, motion denial, rather than forwarding the appeal to our office, was also erroneous. Although the Director may reopen a matter on service motion, the Director must give the Petitioner an additional briefing period before a decision is made, if the decision is to be adverse. *See* 8 C.F.R. § 103.5 (a)(5)(ii). Additionally, once an appeal is filed, the Director may treat the appeal as a motion but only if the decision is going to be favorable. *See* 8 C.F.R. § 103.5 (a)(8). Here the Director did not adhere to these regulations. Finally, it is unclear under what authority the Director issued the revocation decision on December 8, 2017, given the prior denial and revocation decisions that had already been issued.

Because of the numerous procedural irregularities involved in this case, we will withdraw the Director's decisions dated July 19, 2017, October 3, 2017, December 7, 2017, and December 8, 2017, reinstate the validity of the labor certification, and remand the matter to the Director for issuance of a new decision. On remand, the Director may consider whether the Petitioner has established eligibility and determine whether or not there are grounds to revoke the petition's

approval and/or invalidate the labor certification. With regard to the invalidation, we note that the DOL regulation at 20 C.F.R. § 656.30(d) states the following:

> After issuance, a labor certification may be revoked by ETA using the procedures described in Sec. 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate, shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Thus, the invalidation of a labor certification by USCIS requires a finding of fraud or willful misrepresentation of material fact involving the labor certification application.

A finding of fraud requires a determination that the alien made a false representation of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed and acted upon by the officer. *See Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956). A misrepresentation is an assertion or manifestation that is not in accord with the true facts. For an immigration officer to find a willful and material misrepresentation of fact, he or she must determine that (1) the petitioner or beneficiary made a false representation to an authorized official of the U.S. government, (2) the misrepresentation was willfully made, and (3) the fact misrepresented was material. *See Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289 (BIA 1975). The term "willfully" means knowing and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A "material" misrepresentation is one that "tends to shut off a line of inquiry relevant to the alien's eligibility." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980).

In his decision invalidating the labor certification, the Director noted that the Beneficiary provided conflicting information about her employment history in an earlier nonimmigrant visa application. The Director found that the conflicting information was not resolved in the Petitioner's response to the NOIR, and concluded that "because of conflicting evidence" the labor certification must be invalidated. The Director then revoked the approval of the petition on the ground that it lacked a valid labor certification.

This invalidation of the labor certification did not comport with the requirements of 20 C.F.R. § 656.30(d), however, because the Director made no finding of fraud or willful misrepresentation of a material fact. Absent such a finding the Director had no legal basis to invalidate the labor certification.

On remand the Director shall review the evidence of record and determine whether a finding of fraud or willful misrepresentation of a material fact against the Beneficiary and/or Petitioner involving the labor certification application would be warranted. If the labor certification is properly invalidated based on a finding of fraud or willful misrepresentation of a material fact, the prior approval of the petition is automatically revoked. *See* 8 C.F.R. § 205.1(a)(3)(iii)(A). Prior to any finding of fraud or misrepresentation, the Director shall give the petitioner notice and an opportunity to rebut the findings.

If the Director does not make a finding of fraud or willful misrepresentation of a material fact against the Petitioner or the Beneficiary involving the labor certification application, there would be no ground to invalidate the labor certification and no ground to revoke the approval of the petition for lack of a valid labor certification. In such case the Director would not be precluded from considering other grounds for revocation of the petition's approval. If the Director finds, after a full review of the record, that the petition's approval should be revoked for any reason not discussed in the May 10, 2017, NOIR, the Director shall issue a new NOIR prior to revoking the petition's approval.

III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of whether the labor certification should be invalidated and the approval of the petition revoked.

ORDER: The Petitioner's appeals are consolidated.

FURTHER ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

FURTHER ORDER: The ETA Form 9089, case number , is reinstated.

Cite as *Matter of N-Y-D-Y-F-* ID# 1668540 (AAO Nov. 20, 2018)